THE

PROTOCOL QUESTION,

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The Protocol signed by Messrs. SEVIER and CLIFFORD with the Minister of eign Affairs of Mexico, on the 26th of May of last year, immediately before ratification of the Treaty of Peace by the President of that nation, has now n before the public in this country for six months, during which it has been subject of discussions in both Houses of Congress, of Executive communica- s, and of diplomatic correspondence, in addition to innumerable articles in news- ers and reviews. Opinions seem, however, to be still far from uniform with ject to it, and the utmost diversity of views may be observed among persons of political parties as to the validity of the instrument, the character of its clauses, the position which our Government should assume in regard to it.

This diversity of opinion arises in a great measure from the fact, that neither Protocol nor the circumstances under which it was drawn up and signed have et been presented in a light sufficiently distinct to prevent very great misap- ensions, in the minds even of those who have most honestly endeavored to ar- at correct conclusions. The ignorant have been made the dupes of the de- ing, while the latter have been in general too much engaged in misleading others ave any time left for ascertaining the truth themselves. None but a Quixote d expect that any exposition of the truth would be admitted by those whose in- sts or self-love are already engaged in the support of erroneous opinions on subject; but only a small portion of our countrymen are embraced in this cate- , and the following statement of the facts and the principles of national law in- ed in them, may perhaps serve to produce among the greater and better por- a nearer approach to that uniformity of correct views and feelings which is so ntial, especially on matters calculated—as that in question seems to be—to affect honor of our country and its standing among nations.

We commence with the origin and birth of the Protocol, which seems to have most especially misunderstood, in consequence cheifly of the direct misstate

ments contained in the preamble of the instrument. The circumstances are briefly and exactly these:

The Treaty of Peace between the United States and Mexico, signed at Guadalupe Hidalgo, near the capital of the latter republic, on the 2d of February, 1848, contained several stipulations respecting the religion, or rather the ecclesiastic rights and privileges, of the inhabitants of the territories then ceded to the United States, as well as the validity of the grants of lands in those countries, the mode of payment of the sums to be given to Mexico in return for them, and on other points, which our Senate refused to admit. Some of the clauses containing these stipulations were accordingly expunged, and others were considerably modified by that body; and the treaty, thus amended, having been approved, was ratified by President Polk on the 16th of March, and sent back to Mexico for approval and ratification, agreeably to the laws of that country. As, however, these amendments might occasion difficulties, and the much-desired re-establishment of peace be thus frustrated or delayed, Mr. Ambrose H. Sevier, then a Senator from Arkansas, and Mr. Nathan Clifford, then Attorney General of the United States, were dispatched as Commissioners Plenipotentiary to Mexico, with instructions to explain the nature and reasons of the changes, and with powers to receive the ratifications of the Treaty of Peace, and to negotiate a new treaty on one of the points on which alterations were made.

Before going further, it should be observed that the difference between *powers* and *instructions* is as great in diplomatic transactions as in those of ordinary legal proceedings. The instructions are given by the Secretary of State, or Minister of Foreign Affairs, for the direction of the Plenipotentiary in the use of his powers. He may or may not exhibit them to the party with which he is to treat, and he may depart from them on his own responsibility; in which case, however, it is always a difficult and delicate matter for his Government to refuse to sanction his acts and engagements made in accordance with his powers. The powers, on the other hand, must necessarily be exhibited to the other party as a warrant for the validity of the proceedings or promises of the Plenipotentiary; and any engagements which he might make beyond the limits of those powers might be declared void by his Government without any difficulty or hesitation.

Messrs. Sevier and Clifford were on this occasion furnished with a full power, dated March 18, 1848, to exchange the ratification of the Treaty of Peace, "*in the form in which it has been amended by the Senate of the United States, for the like ratification on the part of the Mexican Government of the said treaty.*" They were also empowered, by a separate instrument, on the 22d of the same month, to negotiate and conclude with the Mexican Government "a treaty changing the mode of payment of the twelve millions of dollars stipulated to be paid by the Government of the United States to that of the Mexican Republic by the twelfth article of the treaty of Guadalupe Hidalgo, as it has been amended by the Senate of the United States, in any manner which by them may be deemed expedient; the said treaty to be transmitted to the President of the United States for his ratification, by and with the advice and consent of the Senate thereof." Such were the

powers of the Commissioners; such were all the powers given to them; and the exact and specific nature of the duties thus committed to them forbids the slightest inference that they could have been authorized to go beyond those two objects.

For their conduct in the exercise of these powers they were furnished with instructions from the Hon. JAMES BUCHANAN, our Secretary of State, than which nothing could be more clear and explicit as to what they might do, and as to what they should on no account do; and they moreover carried a letter from the Secretary to the Mexican Minister of Foreign Relations, exhibiting, in terms at once positive and conciliatory, the extent and effects of the several changes made by our Government in the treaty. In their first instructions, dated March 18, they are told:

"You are not sent to Mexico for the purpose of negotiating any new treaty, or of changing, in any particular, the ratified treaty which you will bear with you. None of the amendments adopted by the Senate can be rejected or modified, except by the authority of that body. Your whole duty will then consist in using every honorable effort to obtain from the Mexican Government a ratification of the treaty in the form in which it has been ratified by the Senate; and this with the least practicable delay. For this purpose it may, and most probably will, become necessary that you should explain to the Mexican Minister for Foreign Affairs, or to other authorized agents of the Mexican Government, the reasons which have influenced the Senate in adopting their several amendments to the treaty. *This duty you will perform as much as possible by personal conferences. Diplomatic notes are to be avoided, unless in case of necessity.* These might lead to endless discussions and indefinite delay. Besides, they could not have any practical result, as *your mission is confined to procuring a ratification from the Mexican Government of the treaty as it came from the Senate, and does not extend to the slightest modification in any of its provisions.*"

As a provision for a contingency which might occur, the instructions continue thus:

"Should you find it impossible, after exhausting every honorable effort for this purpose, to obtain a ratification from the President and Congress of Mexico of the treaty, as it has been amended by the Senate, it may then become necessary for you, in conversation with the proper Mexican authorities, to express an opinion as to what portion of the Senate's amendments they might probably be willing to yield for the sake of restoring peace between the two Republics."

They were thus, in fine, limited to the verbal expression of opinions as to the amendments made by the Senate, from which that body might be disposed to yield, though they were "to insist strenuously upon the ratification of the treaty by the Mexican Government, just as it has been ratified by the Senate," until this object should have been found unattainable.

By the second and last letter of instructions, respecting the exercise of the second power conferred on them—namely, for negotiating a new treaty as to the mode of payment of the money by the United States—they were not to conclude engagements on that point until the Mexican Government "shall have first ratified the original treaty, with all the amendments adopted by the Senate;" and any treaty which they might thus conclude was to be ratified by Mexico, and sent to Washington immediately for approval and ratification on our part.

Messrs. Sevier and Clifford, with these powers and instructions, arrived at Queretaro, then the seat of the Mexican Government, on the 25th of May, before which the treaty, as amended by our Government, had been approved by the Chamber of Deputies and the Senate of Mexico, as required by the constitution of that Republic. On the following day several conferences were held between them and the Mexican Minister of State, in the course of which they *verbally* explained the alterations made in the treaty; but they were induced, in defiance of the express recom-

ıendations of Mr. Buchanan, to consign these explanations to writing, in an instruıent styled a *Protocol*, signed by themselves and the Mexican Minister of Foreign ıelations, on the 26th of May, wherein it is declared that the explanations were ven by the Plenipotentiaries of the United States "*with full powers from their ıovernment*" to make them, and were accepted by the Mexican Government, hich, "with the understanding conveyed by them, would proceed to ratify the eaty of Guadalupe, as modified by the Senate and Government of the United tates." This Protocol was communicated to the Mexican Congress, which, however, took no further action upon it than to order it to be placed among the archives; ıd the President of that Republic, on the 30th of May, ratified the treaty, as approved by the Congress, without any notice whatsoever of the explanations of the ommissioners of the United States, or of the document in which they were reorded. In conformity with the treaty, the first instalment of three millions of ollars was paid to the Mexican Government, in the city of Mexico, early in June, ıd the armies of the United States soon after evacuated all the places occupied y them within the limits of the Mexican territory.

On the 6th of July following, President Polk sent to Congress, with his message n this subject, copies of the treaty, and of portions of the correspondence reıting to its ratification. Among the letters of Messrs. Sevier and Clifford thus ent, is one of the 30th of May, mentioning their conferences with the Mexican Ministers, which "they say it was not thought necessary to recapitulate, as we enlose a copy of the Protocol, which contains the substance of the conversations." President Polk, however, did not send a copy of this Protocol to either House of Congress, nor make any allusion to it in his message; and it remained utterly unnown, in the United States at least, until the 3d of February, 1849, when a copy f it was submitted, by the Hon. Mr. Stephens, of Georgia, to the House of Repesentatives, which immediately called on the Executive for information on the ubject. The call was answered by a message from President Polk on the 8th, ccompanied by copies of Mr. Buchanan's instructions to the Commissioners, seveal additional letters which passed between the Commissioners and the Mexican Government, and "*the memorandum of conversations embraced in the paper called a Protocol;*" all of which, the President says, were not before communicated, '*because they were not regarded as in any way material.*"

The judgment of President Polk on this subject has not been confirmed by the people of the United States, who are almost unanimous in considering the Protocol, and the other papers communicated with this last mentioned message, as very '*material.*" Some, indeed, whose opinions are considered as entitled to much respect, have regarded the Protocol as involving material changes in the Treaty of Peace, and even as tending to invalidate that compact; while few, if any, are disposed to admit as satisfactory the reasons of President Polk, or any other reasons, for withholding these papers from Congress. Several grave questions are indeed raised by this transaction, which President Polk thus assumed the responsibility of answering himself, without the concurrence of the legislative branch of our Govern-

ment, empowered by the Constitution to sanction and to provide the means of executing our agreements with foreign nations.

Before examining the contents of this Protocol, it will be proper to show the meaning and value of the term, which seems to have been wholly misunderstood by President Polk, and by many other persons.

Protocol is a word of Greek derivation, signifying *the first glue;* and was applied at Constantinople, under the Greek Emperors, to the formulas somewhat resembling our modern stamps, at the commencement of notarial documents, containing the name of the sovereign and the subject of the deed, &c. inscribed on a slip of parchment, which was purchased from a public office and fastened by glue to the top of the sheet. The word was afterwards used to denote the first copy or official record of a deed, and such is its meaning at the present day in countries where the civil law prevails, and wherever it is mentioned in English law. In diplomacy its introduction is of comparatively recent date. It has not been found in the record of any negotiation anterior to the present century, or indeed to the Congress of Vienna, where it seems to have been first employed; nor is it mentioned in any of the older treatises on national law or diplomacy; and it is exclusively confined to official statements of the proceedings of conferences between plenipotentiaries, which are in all cases signed by each and all of them, and is always considered as authoritative. In these respects a Protocol differs wholly from a *memorandum* or *verbal note;* which, whether drawn up by the plenipotentiaries singly or jointly, is not signed, and has no official value or authority, being merely intended to aid the memories of the parties.

A Protocol is thus a serious and substantial record—a provisional convention or treaty—fixing the promises, offers, demands, and explanations advanced by each party in the negotiation, so that they cannot in good faith be withdrawn, without the assignment of satisfactory reasons; and, as every negotiation is and must necessarily be preceded by the exhibition of the powers of each Plenipotentiary, beyond which he cannot contract an engagement, so of course the promises, offers, demands, and explanations made by him, whether recorded in a protocol or not, are of no value if they exceed the powers thus exhibited by them.

This view of the nature and official value of a Protocol is confirmed by the practice of all the most celebrated negotiations in which they have been employed. A most striking instance of the importance attached to the contents of such a document is afforded in the negotiation at London on the Oregon territory in 1827, between our Minister Plenipotentiary Mr. Gallatin and the Commissioners of the British Government; in the course of which long discussions took place, and long and labored memorials were presented on each side, with regard to the right claimed by the British Plenipotentiaries to insert, in the Protocol containing the minute of the agreement for extending the period of the joint occupation of the territory, a declaration of their views of the nature of that occupation. Mr. Gallatin positively refused to admit any such addition to the Protocol, "*as it appeared to him tantamount to the insertion in the convention of the same provisions*" which the United States had already refused to admit. No one can doubt the propriety of Mr.

Gallatin's refusal in this case. The agreement made in the conference was entered on the Protocol, as a record of the proposition which was to be submitted to each Government for its approval and ratification as a treaty; it was drawn up in the most general terms, and if the British Commissioners had been allowed to inscribe and leave on the Protocol their interpretation of the meaning and extent of those terms, which was entirely in favor of Great Britain, the United States, after its ratification of the agreement, of which the Protocol was the sole official record, would have been as fully bound to act according to the interpretation as if it had been inserted word for word in the treaty. In negotiations between plenipotentiaries of Governments in which treaties are made and executed by the will of the Sovereign alone, the Protocols of conferences may, on being signed by the parties, become in effect actual treaties; and this was the case not only at Vienna in 1824, but during the conferences of the five great Powers of Europe at London on the Belgian question in 1831, where the Protocol of each conference embraced resolutions which were immediately carried into execution. Messrs. Sevier and Clifford were neither plenipotentiaries of an absolute Sovereign, nor were they in the same position in which Mr. Gallatin stood in 1827. They were sent simply to exchange the ratifications of a treaty already completed on our part, and were authorized merely to give explanations on such points as the Mexican Government might possibly misapprehend. They were to give *explanations*, not *interpretations*; for the treaty was clear and unambiguous in all the points to which our amendments related.

After these observations as to the nature of the powers and duties of our Commissioners, we proceed to examine the contents and character of the document which they assumed the responsibility of signing at Queretaro on the 26th of May, 1848. This document is styled—

"PROTOCOL of the conference previous to the ratification and exchange of the Treaty of Peace, between Ambrose H. Sevier and Nathan Clifford, commissioned as Ministers Plenipotentiary on the part of the United States of America, and Don Luis de la Rosa, Minister of Foreign and Internal Affairs of the Mexican Republic."

"In the city of Queretaro, on the 25th of the month of May, 1848, at a conference between their excellencies Nathan Clifford and Ambrose H. Sevier, Commissioners of the United States of America, with full powers from their Government to make to the Mexican republic suitable explanations in regard to the amendments which the Senate and Government of the said United States have made in the Treaty of Peace, friendship, limits, and definitive settlement between the two republics, signed in the city of Gaudalupe Hidalgo on the 2d day of February of the present year, and his excellency Don Luis de la Rosa, Minister of Foreign Affairs of the republic of Mexico, it was agreed, after adequate conversation respecting the changes alluded to, to record in the present Protocol the following explanations, which their aforesaid excellencies the Commissioners gave in the name of their Government, and in fulfilment of the commission conferred upon them near the Mexican republic."

It is thus declared that the Commissioners of the United States appeared at the conferences "with full powers from their Government, to make to the Mexican republic suitable explanations in regard to the amendments," &c., and that they gave those explanations "in the name of their Government, and in fulfilment of the commission conferred upon them near the Mexican Government." That no such powers or commission were ever directly conferred upon Messrs. Sevier and Clifford, has been already shown; and it would be difficult, if possible, for the most inge-

nious interpreter to extract from Mr. Buchanan's instructions to those gentlemen, any authority whatsoever for making the explanations contained in the three articles of the Protocol. The words "Senate and Government of the United States"—separating the Senate from the Government—appear somewhat strange in a document signed by gentlemen who had filled and continued to fill high and important places in the republic. They might have been regarded as the results of inadvertency, in rendering the word *Gobierno* in the Spanish version, which is confined in its signification to the Executive, by the English word *Government*, embracing among us all the branches of the political powers of the republic; but the other articles of the Protocol afford strong indication that the Commissioners regarded the Government as resting, *quo ad hoc* at least, in the hands of the Executive.

The explanations thus made on such questionable authority by our Commissioners, relate to three of the articles of the treaty; for one of which a new article was substituted by our Senate, while another was wholly expunged, and the third was deprived of one of its clauses.

The ninth article of the treaty, as it stood when submitted to our Senate, provided, first, that the people of the countries ceded to the United States should enjoy their liberty, property, and civil rights," *as vested in them according to the Mexican laws*," until they should have been admitted to all the privileges of citizens of the Union, which was to be done as soon as the constitution would admit: thus prohibiting the extension of the laws of the United States over those countries, until the people found inhabiting them should have been admitted as citizens of our republic. This article, in the next place, secured, in the most ample manner, to all ecclesiastics and religious corporations or communities, the enjoyment of all their property, individual or corporate, including all temples, houses and edifices devoted to religious, charitable, or beneficent purposes, and all the property destined to their support; none of which property could ever be considered as belonging to the American Government, or as subject to be disposed of or diverted to other uses: thus establishing in the countries ceded, exceptions and exemptions in favor of the Roman Catholic Church, not enjoyed by any other body or individuals in the Union whatsoever. The property thus designated was in fact placed beyond the reach of our laws, as it could not be seized for debt, and probably could not be taxed, without infraction of the engagement, which was in every respect equivalent to the establishment of the odious tenure by mortmain, so long abolished in England, and nearly all other civilized countries. The last clause of this article also assured the most perfect freedom of communication between the Roman Catholics residing in the ceded territories and their respective ecclesiastical authorities, even though the latter should continue to reside in Mexico, until a new demarcation of ecclesiastical districts should have been made. The nature of these communications is not specified, nor the power by which such a new demarcation of ecclesiastical districts might be made. There can, however, be no reason for supposing that the Archbishop of Mexico, or the Bishops of Durango, Monterey, or Guadalaxara, in whose dioceses the ceded countries are situated, would be inclined in any way, or at any time to loosen the bonds by which they held the Roman Catholic inhabitants of those

countries in complete subjection, or that they would fail to employ their influence to the advantage of Mexico or to the detriment of the United States, if there should be occasion. If the communications were to be confined to spiritual matters only, the engagement in question would be superfluous, as no authority in the United States can restrain them; but as they might, and in all probability would, be employed for political objects also, it would have been egregious folly, or worse, on our part, to have engaged to protect them.

Under these circumstances, our Senate very properly rejected the whole of the original ninth article, and substituted for it one nearly in the terms of the articles on the same points in the Louisiana and Florida treaties, securing to the people of the countries thus acquired by us the free enjoyment of their liberty and property, and the exercise of their religion, without restriction, until they should be admitted to all the rights of citizens of the republic, according to the principles of the constitution; with the material difference, however, that the period of their admission to citizenship is in the present case made entirely dependant upon the judgment of Congress, and nothing is said, even by implication, as to the admission of any of the countries ceded as States in the Union. This was all that was necessary, all that should have been expected, and all that could have been done under our constitution. Messrs. Sevier and Clifford nevertheless assented to the insertion of the following passage in the Protocol signed by them, which completely restores all that was expunged by the Senate:

"1st. The American Government, by suppressing the ninth article of the treaty of Guadalupe, and substituting the third article of the treaty of Louisiana, did not intend to diminish in any way what was agreed upon by the aforesaid article ninth in favor of the inhabitants of the territories ceded by Mexico. Its understanding is, that all of that agreement is contained in the third article of the treaty of Louisiana. In consequence, all the privileges and guaranties, civil, political, and religious, which would have been possessed by the inhabitants of the ceded territories, if the ninth article of the treaty had been retained, will be enjoyed by them, without any difference, under the article which has been substituted."

The Commissioners thus declare that "the American Government," exclusive of course, of the Senate, understands the third article of the Louisiana treaty, which is nearly identical with the ninth article of the Treaty of Peace with Mexico approved by the Senate, as containing all the stipulations embraced in the ninth article rejected by that body; and they pledge the faith of "the American Government" to secure to the people of the territories ceded to the United States all the privileges and guaranties, civil, political, and religious, embraced in the rejected article, without any difference or diminution whatever, the decision of the Senate to the contrary notwithstanding. That they had no direct power to make this pledge, it is scarcely necessary to repeat; and their only authority for any *explanations* on these points is to be found in the letters of Mr. Buchanan to the Mexican Minister of Foreign Affairs, and to themselves. In these letters, our Secretary of State does indeed express as his own opinion, and as that of the President, that the original ninth article and the article substituted for it by the Senate are "substantially" the same; and that the Mexican Government ought to be content with a security which has proved satisfactory to the Governments of France and Spain, and to the people of the countries ceded by those Powers to the United States; and he

refers the Commissioners on this and all other points to their "own intimate and personal knowledge of all the proceedings of the Senate on the treaty," which would enable them "promptly to furnish every explanation which may be required." The debates of the Senate on the treaty have not yet been made public; but it seems scarcely probable that this body would have taken upon itself a responsibility so serious as the rejection of an article in a treaty which was to terminate a war, while considering the stipulations contained in it as "substantially" the same with those of the article substituted by itself. The explanations which the Commissioners were instructed to make on this head were to be of such a nature as to remove from the Mexican Government any apprehensions that the people of the countries ceded under the treaty would be deprived of any rights which had been enjoyed by the people of the other countries, acquired by the United States in a similar way; and any assurances which they made beyond this liberty and limitation, were wholly gratuitous on their parts. They were sent to obtain the ratification of the treaty on this as on all other points, "*just as it had been ratified by the Senate*," in the same *sense* as well as in the same *words*, and in none other.

The next explanation made by our Commissioners in the Protocol related to the tenth article of the original treaty, which was completely expunged by the Senate. By it all grants of lands made by Mexico in the ceded territories shall be respected as valid, to the same extent as if those territories had remained in the possession of Mexico, with the understanding that no such grants have been made in Texas since the 2d of March, 1836, (the date of the declaration of the independence of that country,) or in the other territories ceded since the 13th of May, 1846, (the date of the declaration of war by the United States against Mexico;) and the grantees who had been put in possession of their lands, but had been prevented by the circumstances arising from the troubles between Texas and Mexico, from fulfilling all the conditions of their grants, shall be obliged (that is, entitled) to fulfil them within the periods assigned in their respective grants, to be counted from the exchange of the ratifications of the present Treaty of Peace. This article was nearly identical in its provisions with the eighth article of the treaty by which Spain ceded Florida to the United States. The grants of land here in question were nearly all made by the Mexican Government, or under its authority, to persons styled *empresarios*, or contractors, who engaged, within a certain number of years, to establish a certain number of colonists on the lands, and to perform certain other acts with regard to them, upon the completion of which, at or before the expiration of the time allowed, their right to the lands became perfect and indefeasible.

Upon this article Mr. BUCHANAN speaks thus clearly and forcibly in his instructions to the Commissioners:

"Neither the President nor the Senate of the United States can ever consent to ratify any treaty containing the tenth article of the treaty of Guadalupe Hidalgo, in favor of grantees of land in Texas or elsewhere. The Government of the United States do not possess the power to carry such an article into execution, and, if they did, it would be highly unjust and inexpedient. Should the Mexican Government persist in retaining this article, then all prospect of immediate peace is ended, and of this you may give them an absolute assurance."

Still stronger are the expressions of our Secretary of State, in his letter to the Mexican Minister, where he says:

"It is truly unaccountable how this article should have found a place in the treaty. That portion of it in regard to lands in Texas did not receive a single vote in the Senate. If it were adopted it would be a mere nullity on the face of the treaty, and the judges of our courts would be compelled to disregard it." * * * * * * * * *

"These Mexican grants, it is understood, cover nearly the whole seacoast and a large portion of the interior of Texas. They embrace thriving villages and a great number of cultivated farms, the proprietors of which have acquired them honestly by purchase from the State of Texas. These proprietors are now dwelling in peace and security. To revive dead titles and suffer the inhabitants of Texas to be ejected under them from their possessions, would be an act of flagrant injustice, if not wanton cruelty. Fortunately this Government possesses no power to adopt such a proceeding."

It would be needless to produce additional reasons to show that the Commissioners were specially prohibited by their instructions from any explanations on this point, further than as they might tend to impress upon the Mexican Government the determination, on our part, not to concede any thing; and Messrs. Sevier and Clifford should have limited themselves to a reference to the eighth article of the treaty, by which all Mexicans then established in the territories ceded to the United States, or in those remaining to Mexico, are secured in the possession of their property, and of all the rights and guaranties connected with it, as amply as if it belonged to citizens of the United States. They, however, thought proper to declare, in the second article of the Protocol:

"2d. The American Government, by suppressing the tenth article of the treaty of Gaudalupe, did not, in any way, intend to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppression of this article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be *acknowledged* before the American tribunals.

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which are legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2d of March, 1836."

This declaration tends, as clearly as that which preceded it, to the restoration of the article expunged by our Senate; and it may, perhaps, be interpreted as going further to the prejudice of the United States. The grants of lands by the Mexican Government to *empresarios* usually allowed them six years, and in many cases double that time, to complete the conditions; and very few of the grants of lands in Texas had been rendered thus complete and indefeasible before that country became independent of Mexico. Yet all these grants were legitimate titles, under the Mexican law, up to the period last mentioned, March 2, 1836; and, according to the Protocol, they are regarded by our law as legitimate, and the grantees may have them acknowledged as such before the American courts. That is to say, the American courts must either acknowledge them as already valid, or allow the claimants time to fulfil their conditions. This was done with regard to the grants in Florida, which were thus protected by the Treaty of Washington; and no other alternative is left, if our courts are obliged to admit as legitimate the grants which were legitimate under the Mexican law at the date of the independence of Texas. This is certainly impracticable with regard to lands in Texas. The *empresario* grants in that country were among the principal grounds of discontent which led to the separation from Mexico. They have always been repudiated by Texas, and the

United States cannot, either in policy or in honor, admit their revival. The case may be somewhat different with regard to grants in California or New Mexico; but our Senate was equally unwilling to bind the United States to admit them, for the same reasons which had caused their rejection by Texas; and the claimants were accordingly required to appear before our courts, and submit to their decisions, agreeably to our principles of law, and to the precedents afforded by the decisions of our courts, the liberality of which has not been questioned. We offered to pay Mexico fifteen millions of dollars, and to take upon ourselves the indemnification of our own citizens for injuries received from Mexico before the war. This was a pure gratuity, as the territories for which it was nominally given were already in our possession; and any other nation would have required from Mexico the payment of a much greater sum for the ransom of its capital, and the other portions of its territory which were also in our hands. With these terms Mexico should be contented; and if the claims of her *empresarios* be just, she should discharge them herself. Such was probably the view of the Senate, which refused all responsibility for them on the part of the United States.

It should be also observed, with regard to this portion of the Protocol, that it distinctly revives a portion of the expunged article, which could not fail to occasion great embarrassment. What is Texas? What are its boundaries on the south and west? What were they before the 2d of March, 1836? What were they during the interval between that day and the 13th of May, 1846? Did the Mexican Government make any grants of lands during this interval in the territories east of the Rio Bravo, (or Rio Grande;) and, if so, are they to be admitted as valid on proof of the fulfilment of the conditions, or to be rejected as void *ab initio?* The right of Texas to the whole territory east of the Rio Bravo has been, indeed, asserted by President Polk, in his message to Congress of December 8, 1846; and in support of this assumed title, our troops had been sent to the Rio Bravo in March previous. But this right is not, nor can it ever be, sustained by proofs; and the limits of Texas on the west and south are, to this day, not determined, either by decision of our National Legislature, to which the right of settling the question is reserved exclusively by the terms of admission of Texas into the Union, or by the Treaty of Peace with Mexico, which, as ratified, makes no special mention of Texas in any of its articles. This consideration may also have contributed to induce the Senate to expunge the tenth article; and it should have rendered our Commissioners careful to do nothing which might tend to prejudge a question so important, or at least to increase the difficulties of its solution.

The suppression of this tenth article formed probably one of two principal objections on the part of Mexico to the treaty as amended by our Senate; as many of the most influential persons in that country are known to be interested, directly or indirectly, in the grants to which the article referred; and the terms of the Protocol were well calculated to revive their expectations of advantage from them. The other principal objection to the treaty arose from the suppression of a part of the twelfth article. That article provided for the payment of fifteen millions of dollars by the United States to Mexico, of which three millions were to be de-

livered immediately on the ratification of the treaty by the latter, and the remainder in annual instalments of three millions each, with interest at six per cent. The money was to be paid in gold or silver coin of Mexican stamp, in the city of Mexico, on the anniversaries of the ratification of the treaty; the whole interest on each instalment being paid with it.

Such were the terms of the payments, according to the twelfth article, as ratified by our Senate. The original article, however, contained in addition a clause providing for the delivery of certificates for the said instalments, in such sums as the Mexican Government should desire, *which certificates were to be transferable by that Government* at its pleasure. This provision was entirely expunged by our Senate, for reasons which, though not yet given to the world, are so numerous and obvious that they must at once present themselves to the mind of every one. That clause would have enabled the Mexican Government, *immediately*, to obtain the whole of the millions payable by us in twelve years at a cheap rate; and it is needless to say what would have been the consequences to the United States. The suppression of the clause not only gave greater security for the fulfilment of the obligations of the treaty by Mexico, and for the continuance of the peace between the two nations, but it also removed the temptation for a renewal of those melan choly violations of law and order so frequent in Mexico, which would have been afforded by the facility for misappropriation of the sums payable by the United States, and obtainable immediately by the sale of the proposed certificates. The suppression was, in fact, no less beneficial to Mexico than to the United States. The provision that the money should be paid only in the instalments and on the days appointed, and only in the capital of Mexico, rendered the anticipation of any instalment payable at a distant period extremely difficult, if not wholly impracticable; for capitalists, very properly designated by Mr. Buchanan as a "*timid race*," would never advance their funds on a contingency so improbable as the duration of the power of the party engaging to redeem such an obligation, until the day when it should become redeemable.

Our Commissioners were, on this point also, instructed to urge the ratification of the treaty as amended by our Senate; though they were at the same time informed by Mr. Buchanan that "that enlightened body would not probably insist on those amendments if it should appear that they involved the question of peace or war;" and they were furnished with official evidences of the debt in exact conformity with the treaty as amended, *but not transferable or negotiable*, which they were authorized, if it should become indispensable, to deliver, and on which it was "believed that the Mexican Government might raise the means necessary for their immediate support." The Commissioners were, as already said, authorized by a special power, granted on the 22d of March, 1848, to negotiate and conclude a new treaty with Mexico, changing the mode of payment as settled in the twelfth article of the Treaty of Peace; being required, however, by their instructions of the same date, not to conclude such a new treaty until the Mexican Government "shall have first ratified the original treaty with all the amendments adopted by the Senate;" and the new treaty which might be thus concluded was to be approved

and ratified byMexico, and sent to Washington for approval by our Senate and ratification by our President, in order to give it effect. Whether or not the Commissioners exhibited this power to the Mexican Government, or entered into any negotiation on the subject, we know not: it certainly does not appear that they concluded any new treaty with Mexico after the ratification of the Treaty of Peace by that Power, though they did admit the insertion into the Protocol of the following passage in addition to those already quoted:

"3d. The Government of the United States, by suppressing the concluding paragraph of article twelfth of the treaty, did not intend to deprive the Mexican Republic of the free and unrestrained faculty of ceding, conveying, or transferring, at any time (as it may judge best) the sum of twelve millions of dollars, which the same Government of the United States is to deliver in the places designated by the amended article."

This portion of the Protocol is more nearly consonant than any other with the letter of the Secretary of State to the Mexican Minister of Foreign Affairs, and with his *first* letter of instructions to the Commissioners, both of which do tend to encourage the expectation that the United States would honor the draughts of the Mexican Government in favor of other parties, at the time and place appointed for the payment of the instalments by the terms of the twelfth article of the amended treaty, and perhaps even that those draughts might be accepted by our Government before they became payable. The second power, and the instructions accompanying it, however, seem no less clearly equivalent to a withdrawal of this encouragement, by requiring the conclusion and ratification of a new treaty, in order to effect any change in the mode of payment already adopted in the amended Treaty of Peace. Certainly the explanation given by the Commissioners in the third article of the Protocol is entirely out of the limits of their powers, which are exact and specific. Under whatsoever authority this explanation may have been made, if it can be construed as a declaration of our readiness to pay either of the instalments, or any part of either, to and upon a receipt from any other than the member or members of the Government of the Mexican Republic, established in the city of Mexico on the days appointed in the Treaty of Peace, who are legally competent to receive the money and to give such receipts, it is null and void, as being at variance with the letter and spirit of the treaty, and made by persons not authorized to offer it.

These are the explanations, or engagements as they might more properly be styled, made by our Commissioners, and recorded in the Protocol, which concludes as follows:

"And these explanations having been accepted by the Minister of Foreign Affairs of the Mexican Republic, he declared, in the name of his Government, that, with the understanding conveyed by them, the same Government would proceed to ratify the treaty of Guadalupe, as modified by the Senate and Government of the United States.

"In testimony of which their excellencies, the aforesaid Commissioners, have signed and sealed, in quintuple, the present Protocol.

"NATHAN CLIFFORD,
"AMBROSE H. SEVIER,
"LUIS DE LA ROSA."

Now, this is certainly something more than a mere memorandum of conferences. It is a record of promises and engagements declared to be made in the name of the Government of the United States, and in virtue of full powers received from that Gov-

ernment; and if such full powers could be produced, it would be difficult to prove that this Protocol is not, in all respects, a treaty or convention, in the first of the three stages through which every compact between the United States and Mexico must pass, agreeably to the constitutions of both nations, before it can be binding on either. This Protocol has been by some assimilated to the conditional ratification given by Bonaparte when First Consul of France to the treaty of 1800 with the United States: but this assimilation is defective in the most essential points; for the alteration required by Bonaparte is declared at length in the ratification itself; and the treaty ratified with this condition, was again submitted to our Senate, which approved it, and was ratified by our President; so that the change was in all respects established in the treaty itself. The Protocol of May, 1848, on the contrary, though signed and sealed by the plenipotentiaries of both nations who exchanged the ratifications of the Treaty of Peace, is in no way noticed in that treaty, which was completed by the ratification of the Mexican President, containing no allusion to any modification or explanation of the terms of the compact. The Protocol more nearly resembles the additional articles to our treaty with Great Britain of 1794, (well known as Jay's treaty)—explanatory of certain points which were found to be not stated with sufficient distinctness for their fulfilment in that treaty. But these additional articles were each negotiated under special powers to that effect, and were approved and ratified by the two Governments, as if each had been a separate treaty.

In recapitulation of what has been here said, it has been shown—

1. That our Commissioners had no powers to negotiate on any of the points to which the Protocol refers, except as to the mode of payment of the twelve millions, on which, however, they could conclude nothing until the Treaty of Peace, as amended on our part, had been ratified by Mexico.

2. That the explanations and assurances given by our Commissioners to the Mexican Government are in direct opposition to the sense of the Treaty of Peace, as clearly and unequivocally shown by its terms.

3. That the treaty was ratified by the Mexican Government, without any protest, exception, or objection whatever, in its act of ratification, to any part of the treaty.

4. That the ratification was given by the Mexican Government with the full and certain knowledge, on its part, of the exactness of the first and second of the above propositions.

5. That the Mexican Government confirmed its assent to the treaty by immediately afterwards accepting the first instalment of three millions of dollars, made payable to it by the United States under the twelfth article, and by other acts in accordance with other stipulations of the same.

If these propositions be admitted—and no grounds can be seen for impugning any one of them in any way—it follows necessarily that Mexico is bound to the observance of the treaty in all respects, by every principle of national law and national honor; and the United States are equally justified in disregarding the interpreta-

tions to which their Commissioners assented, in signing the Protocol without any power or authority to do so, and in express contravention of their instructions.

Here we might end the examination of this question; it is, however, proper to add some observations as to the conduct of our Executive after the ratification of the treaty. The Protocol was, on its face, an engagement made by American Plenipotentiaries, duly appointed by the President and approved by the Senate, and acting under full powers in the name of their Government, binding the United States to execute the Treaty of Peace according to a particular sense. Whether this engagement was valid or not, President Polk could have had no doubt that the Mexican Government would insist upon its validity, and that it might in time become the subject of a contest between the two countries; and it was therefore his duty to communicate it, without delay, to the branch of our National Legislature which is charged, in conjunction with the President, to regulate our intercourse with foreign Governments, and oversee the conduct of those who are commissioned as agents for that purpose. This he, however, did not do; "because," as he says, most strangely indeed, in his message of February 8, he "*did not regard it as material, or as in any way attempting to modify or change the treaty as it had been amended by the Senate of the United States*"—an opinion in which it is believed that no other citizen of the Union, who examines the document critically, will be found to concur with him. It was, moreover, his duty frankly to declare to the Mexican Government, without delay, our intention to execute the treaty and to have it executed by Mexico, only according to its true and clearly expressed sense, any explanations of our Commissioners to the contrary notwithstanding; and on this point we shall conclude by quoting from Vattel a passage which bears almost directly upon it:

"A State cannot be bound by an agreement made without its order, and without its having granted any power for that purpose. But is it absolutely under no obligation? This is what we are now to examine. If things are in their first situation, the State or the Sovereign may disown the treaty, which falls by this disavowal, and is as if it had never been. But the Sovereign ought to manifest his resolution as soon as the treaty comes to his knowledge; not, indeed, that his silence alone can give validity to a convention that cannot have it without his approbation; but it would be unjust for him to give time to the other party to execute on his side an agreement which he would not ratify."

However invalid might be the explanations and assurances recorded in the Protocol, from their nature and the circumstances under which they were made, they were given by the Plenipotentiaries of our Government, and regard for our national honor required a prompt and decided disavowal of their imprudent if not illegal conduct.